Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, and

RASIER, LLC

Plaintiffs,

v.

CITY OF SEATTLE *et al.*,

Defendants.

Case No. 17-cv-00370-RSL

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

NOTING DATE: March 29, 2019

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

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ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

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ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

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ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

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STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

INTRODUCTION AND MOTION

Seattle's ordinance, which authorizes independent-contractor drivers to collectively bargain over the terms of their contracts with ride-referral companies like Uber and Lyft, is a blatant, *per se* violation of federal antitrust law. Last year, the Ninth Circuit rejected Seattle's attempt to hide the ordinance behind the shield of state-action antitrust immunity. *Chamber of Commerce v. City of Seattle*, 890 F.3d 769, 779–80 (9th Cir. 2018). With its only plausible defense off the table, Seattle has now attempted to salvage the ordinance by removing the provisions authorizing horizontal price fixing, the paradigmatic *per se* violation. But Seattle's amendment does not change the required result, and summary judgment should be entered for plaintiffs, for two reasons.

First, the amended ordinance continues to authorize horizontal group boycotts, which are another classic example of *per se* illegal conduct under the Sherman Act. Specifically, the ordinance enables a group of independent drivers (through a union) to exclude rival drivers (such as part-time drivers) from the market by preventing them from contracting with ride-referral companies outside the terms of a collective-bargaining agreement. *Second*, Seattle's voluntary cessation of its price-fixing scheme does not moot Plaintiffs' challenge to the ordinance's price-fixing provisions. Seattle has refused to concede the illegality of those provisions and has given no assurances that they will not be reenacted. And, as the Federal Trade Commission and Department of Justice informed the Ninth Circuit in this case, the price-fixing provisions authorize *per se* illegal conduct for which injunctive relief is warranted.

Summary judgment is appropriate because there are no genuinely disputed issues of fact material to Plaintiffs' claims. Seattle has contended that discovery may be needed on topics like the nature of the relevant markets and whether drivers or ride-referral companies exercise market power. But such inquiries are irrelevant where *per se* rules are involved: group boycotts and price fixing "are so plainly anticompetitive, and so often lack any redeeming virtue, that they are conclusively presumed illegal without further examination" of the market or industry. *Catalano,*

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ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

Inc. v. Target Sales, Inc., 446 U.S. 643, 646 & n.9 (1980) (per curiam) (internal citations, quotation marks, and ellipses omitted). As a result, the Court should grant summary judgment in favor of Plaintiffs, declare the ordinance invalid, both as originally enacted and as amended, and permanently enjoin Seattle from enforcing its provisions.

BACKGROUND

Seattle's ordinance authorizes for-hire drivers to unionize and to negotiate collectively, through those unions, over the terms in the drivers' contracts with ride-referral and similar companies. *See* Seattle Ordinance No. 124968, Doc. 39-1.[1] The ordinance covers only drivers who are independent contractors. Its provisions "do not apply to drivers who are employees under 29 U.S.C. § 152(3)," the National Labor Relations Act. *Id.* § 6; *see also id.* § 1(H) (ordinance directed at "[b]usiness models wherein … drivers [are] classified as independent contractors"). Crucially, the unionized drivers are permitted to demand that the ride-referral company deny contracts to other drivers who do not wish to be covered by the collective-bargaining agreement. *Id.* § 2 (exclusive collective-bargaining agreement "sets forth terms and conditions of work applicable to all of the for-hire drivers" who contract with a ride-referral service). In other words, the ordinance authorizes and facilitates group boycotts of non-conforming drivers.

The union-election process begins when the Seattle Director of Finance and Administrative Services designates a "qualified driver representative," which is an entity seeking to become the exclusive union representative of for-hire drivers who contract with a specific ride-referral service, or "driver coordinator." *Id.* §§ 2, 3(C).[2] The ordinance mandates that driver coordinators provide the qualified representative with the personal contact information of all "qualifying drivers," who

[1] Unless otherwise noted, all docket citations refer to the district court docket in this case, No. 17-cv-00370.

[2] As relevant here, the ordinance defines "driver coordinator" as an entity that "contracts with … for-hire drivers" to "assist[] them with, or facilitate[e] them in, providing for-hire services to the public." Ordinance § 2. As Seattle has stated, "'driver coordinators' include … transportation network companies (like Uber and Lyft)." (Seattle MTD at 2 n.1, Doc. 42.)

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600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

are the only drivers eligible to vote in a union election. *Id.* § 3(D), 3(F)(1).[3] The representative uses that information to contact these voting-eligible drivers and ask for their vote. *Id.* § 3(E–F). If a majority of qualified drivers vote in favor, the Director certifies the qualified representative as the drivers' union, known as the "exclusive driver representative." *Id.* §§ 2, 3(E). The ordinance then mandates collective bargaining between the union and the driver coordinator over various subjects, including "minimum hours of work." *Id.* § 3(H)(1). The ordinance originally mandated collective bargaining over the "payments to be made by, or withheld from, the driver coordinator to or by the drivers," *id.*, but, as discussed below, Seattle recently amended the ordinance to remove that mandate.

Seattle formally designated Teamsters Local 117 as a "qualified driver representative" on March 3, 2017. (Decl. of Matthew Eng ¶ 7, Doc. 39.) On March 7, the Teamsters demanded driver information from twelve driver coordinators that Seattle had identified on its collective-bargaining webpage, including three of the Chamber's members. (*Id.*) As Seattle has confirmed, the ordinance would have compelled these driver coordinators to provide lists of their qualifying drivers to Local 117 by April 3, 2017. (*Id.* ¶ 8.)

Plaintiff Chamber of Commerce of the United States of America sued on March 9, 2017, to enjoin enforcement of the ordinance. (Doc. 1.) The complaint asserted eight claims, raising challenges under both federal and state law. The Chamber subsequently amended the complaint to add Rasier, LLC (Uber's wholly owned subsidiary),[4] as a plaintiff, after Seattle demanded Uber's "individual participation in these proceedings" because Uber, not the Chamber, was subject to the ordinance. (Doc. 53.) As relevant here, the amended complaint asserts two antitrust claims:

[3] Seattle has defined "qualifying driver" as a for-hire driver that (1) "began contracting with … a particular Driver Coordinator at least 90 days prior to the commencement date" of the ordinance, and (2) has driven "at least 52 trips" in Seattle using "a particular Driver Coordinator during any three-month period in the 12 months preceding the commencement date." Director's Rule FHDR-1, Doc. 39-3.

[4] Although Rasier, LLC is distinct from Uber Technologies, Inc., for ease of reference, Rasier, LLC is referred to as "Uber" in this motion.

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600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

first, that the ordinance is preempted by the Sherman Act (Count Two), and second, that the City's implementation of the ordinance constitutes a violation of the Sherman Act, entitling Plaintiffs to an injunction under section 16 of the Clayton Act (Count One).

After initially granting a preliminary injunction to preserve the status quo (Doc. 49), this Court granted Seattle's motion to dismiss all claims. (Doc. 66.) As to the antitrust claims, the Court assumed that the ordinance authorized a *per se* antitrust violation, but held that state-action immunity shielded the ordinance from federal antitrust law. (*Id.* at 6–16.) Plaintiffs appealed, and the Ninth Circuit reversed. It held that the ordinance satisfies neither of the two required elements for state-action immunity, and therefore must comply with federal antitrust law. *Chamber of Commerce*, 890 F.3d at 779–80.

In response to the Ninth Circuit's unfavorable ruling, Seattle amended the ordinance to eliminate the price-fixing provisions. (*See* Seattle City Council Bill No. 119427, enacted January 11, 2019, attached as Ex. A.) Where the ordinance originally mandated collective bargaining over "the nature and amount of payment" between drivers and referral companies, the amendment deletes that mandate and prohibits the City from promulgating regulations that require bargaining over "the nature and amount of payments" between drivers and referral companies. (*Id.*) The amendment also eliminates wages and payments from the list of factors an arbitrator must consider if collective bargaining results in arbitration. (*Id.*) Other than eliminating these price-fixing provisions, however, the amendment leaves the ordinance materially unchanged.

STANDARD OF REVIEW

Summary judgment is appropriate when, "taking the evidence and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Furnace v. Sullivan*, 705 F.3d 1021, 1026 (9th Cir. 2013); Fed. R. Civ. P. 56(a).

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

ARGUMENT

Plaintiffs are entitled to summary judgment on their antitrust claims (Counts One and Two of their amended complaint). *First*, the ordinance authorizes and facilitates *per se* illegal group boycotts. As a result, the ordinance is preempted by federal antitrust law, and the City's implementation of the ordinance violates the Sherman Act. *Second*, the City's amendment did not moot the Chamber's challenge to the price-fixing provisions of the original ordinance. Those provisions likewise authorize and facilitate *per se* illegal conduct and therefore also are preempted and violate the Sherman Act. There are no material facts in genuine dispute for any of these claims, and this Court can resolve this motion on the existing record.

I. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE THE ORDINANCE AUTHORIZES *PER SE* ILLEGAL GROUP BOYCOTTS

The Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Certain collusive practices—like horizontal group boycotts and horizontal price fixing—are condemned as *per se* violations, which means they are unlawful on their face regardless of market conditions or any purported economic or policy justifications. *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 342–48, 351 (1982). Thus, as the Ninth Circuit explained in this case, a valid claim of *per se* illegal conduct does not "require[] an examination of the circumstances underlying a particular economic practice." *Chamber of Commerce*, 890 F.3d at 780. And "there is no need to define a relevant market or to show that the defendants had power within the market." *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 986 (9th Cir. 2000); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225–26 & n.59 (1940) (price-fixing cartel is *per se* illegal even if lacking "power to control the market").

Because the group boycotts authorized and facilitated by the ordinance are illegal *per se*, the ordinance is preempted by the Sherman Act. *See infra* Part I.A. Separately, Seattle's implementation of the ordinance constitutes a *per se* violation of the Sherman Act, warranting injunctive relief under section 16 of the Clayton Act. *See infra* Part I.B. And because *per se* illegal

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600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

conduct requires no further inquiry into market structure and the like, Seattle's defenses fail as a matter of law and require no discovery. *See infra* Part I.C. As a result, the Court should invalidate the entire ordinance. *See infra* Part I.D.

A. The Ordinance Is Preempted Because It Authorizes *Per Se* Illegal Group Boycotts

Absent state-action immunity, federal antitrust law preempts municipal laws that authorize private parties to commit a "*per se* violation" of the Sherman Act. *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982). A party subject to an ordinance that is preempted by the Sherman Act may sue to enjoin its enforcement. *Fisher v. City of Berkeley*, 475 U.S. 260, 264 (1986) (addressing antitrust preemption claim); *see also Verizon Maryland, Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 647–48 (2002) (approving common-law preemption claims). Thus, because Uber and other Chamber members are subject to the amended ordinance and the amended ordinance authorizes a *per se* violation of the Sherman Act, the amended ordinance is preempted.

The amended ordinance authorizes and facilitates horizontal group boycotts of drivers, such as part-time drivers, who will not conform to a collective-bargaining agreement. These boycotts involve concerted action among a group of competing drivers (the union) to force a third party (such as Uber) to target other competing drivers for injury or exclusion from the market. Such horizontal boycotts are a well-established category of *per se* illegal activity because of their tendency to reduce output and increase prices. *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 134 (1998); *see* P. Areeda & H. Hovenkamp, Antitrust Law § 1901 (2019) (horizontal boycotts generally tend to "reduce[] marketwide ouput"); *id.* at § 2201a (horizontal boycotts tend to "reduce either the quantity or quality of total market output").

The Supreme Court has repeatedly applied the *per se* rule to group boycotts "involving horizontal agreements among competitors," which the Court has described as group boycotts "in the strongest sense." *Nynex*, 525 U.S. at 135. These occur when a "group of competitors threaten[] to withhold business from third parties unless those third parties … help them injure their directly

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ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

competing rivals." *Id.*; *see also id.* at 135–36 ("paradigmatic boycott" occurs when there is "'collective action among a group of competitors that may inhibit the competitive vitality of rivals'" (quoting P. Areeda & L. Kaplow, Antitrust Analysis: Problems, Text, and Cases 333 (5th ed. 1997)). For example, a *per se* illegal boycott occurred when a group of competing clothing manufacturers and suppliers agreed with each other "not to sell their clothes to retailers who bought clothes from competing manufacturers and suppliers." *Id.* at 134 (discussing *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457 (1941)). A similar boycott occurred when a group of franchised auto dealers collectively pressured General Motors to forbid all dealers from reselling vehicles to unfranchised "discounters" who competed with the dealers. *United States v. GM Corp.*, 384 U.S. 127, 143–45 (1966). A slightly different *per se* illegal boycott occurred when a single firm, retailer Broadway-Hale, convinced a group of rival distributors to collectively agree not to sell products to Klor's, a retailer that competed with Broadway-Hale. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

The prohibition on group boycotts applies to efforts by individual independent contractors to join or form unions to collectively and exclusively bargain with companies over contract terms, and thereby exclude competitors from contracting with those companies on other terms. Thus, independent fishermen violated the Sherman Act by forming a union and collectively bargaining about the terms and conditions under which they would sell fish to processors, and forcing those buyers to agree "not to purchase fish from nonmembers of the Union." *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143, 145 (1942). Likewise, independent "stitching contractors" violated the Sherman Act by forming a union and collectively bargaining over the provision of stitching services to clothing sellers, and inducing those sellers to contract only with "members of the Association" and to "refrain from dealing with nonmembers." *United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 462 (1949).

The City's ordinance, both before and after its recent amendment, authorizes group boycotts "in the strongest sense." *Nynex*, 525 U.S. at 135. It does this by authorizing a group of

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600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

competing drivers (the union) to jointly demand that driver coordinators (such as plaintiff Uber) deny contracts to all non-conforming drivers—such as part-time drivers—who will not abide by the terms of an exclusive collective-bargaining agreement. Specifically, the ordinance allows voting-eligible drivers to elect an "exclusive driver representative," which becomes the "*sole* and *exclusive* representative of all for-hire drivers operating within the City for a particular driver coordinator." Ordinance § 2. The ensuing actions of the exclusive driver representative constitute horizontal concerted action among the drivers who voted for that representation. *See Arizona*, 457 U.S. at 336, 339, 348 (actions of "county medical societies" constituted horizontal concerted action among the member physicians).

The ordinance then gives the exclusive driver representative power to "enter into a contract that sets forth the terms and conditions of work applicable to *all* of the for-hire drivers" who contract with "that driver coordinator." Ordinance § 2 (emphasis added). This provision directly contemplates and authorizes the union to enter into an exclusive collective-bargaining agreement applicable to all drivers, without exception. Because the collective-bargaining agreement is exclusive, the driver coordinator must deny contracts to any drivers who are unable or unwilling to conform to it. *Id.* One of the mandatory subjects of collective bargaining, for example, is "minimum hours of work." *Id.* § 3(H). A collective-bargaining agreement will therefore deny contracts to the entire class of part-time drivers that cannot or do not wish to work the minimum required hours.[5]

The ordinance thus operates as a group boycott of the same type as the boycotts condemned by Supreme Court precedent as *per se* illegal. As in *Fashion Originator's Guild* and *General Motors*, the union drivers (like the clothing manufacturers and auto dealers) will compel driver coordinators (like the clothing retailers and General Motors) to deny business to a class of non-

[5] *See* John O. McGinnis, *The Sharing Economy as an Equalizing Economy*, 94 Notre Dame L. Rev. 329, 342 (2018) (explaining that "those who choose to drive part-time" as for-hire drivers highly value the flexibility to set their own hours without being subjected to minimum hours requirements).

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ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

conforming drivers (like the boycotted clothing retailers and auto discounters). And, as in *Columbia River Packers* and *Women's Sportswear Manufacturers*, these drivers will effectuate their boycotts by forming unions and compelling driver coordinators not to contract on different terms with non-conforming, rival drivers. The ordinance thus authorizes and facilitates *per se* illegal conduct, and it is therefore preempted by the Sherman Act.

B. Seattle's Implementation of the Ordinance Violates the Sherman Act

Separately from preemption, Seattle's implementation of the ordinance means that Seattle is violating the Sherman Act by participating in an illegal conspiracy in restraint of trade. Absent state-action immunity, which the Ninth Circuit held does not apply here, the antitrust laws "impos[e] civil or criminal sanctions" on "municipalities," just like "other corporate entities." *Community Commc'ns v. City of Boulder*, 455 U.S. 40, 56 (1982); *see also Goldfarb v. Virginia State Bar*, 421 U.S. 773, 780 (1975) (holding that government entities violated section 1 of the Sherman Act by enforcing fee schedules that enabled price fixing by private entities).[6] And Congress has authorized "any" "corporation" or "association" to sue for injunctive relief against "threatened loss or damage by a violation of the antitrust laws." 15 U.S.C. § 26.[7] A "threatened"

[6] The only statutory exception for municipalities is inapplicable. The Local Government Antitrust Act of 1984 (15 U.S.C. §§ 35–36) immunizes municipalities from damages suits under section 4 of the Clayton Act (15 U.S.C. § 15), but does not preclude suits for injunctive relief under section 16 of the Clayton Act (15 U.S.C. § 26). Plaintiffs here seek only injunctive relief.

[7] To establish statutory "standing" to bring a claim under the Clayton Act, a plaintiff must also show "antitrust injury" to itself or to its members, meaning that it "is adversely affected by an *anticompetitive* aspect" of the illegal conduct, *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1990). This Court has already determined that the Chamber has standing under the Clayton Act because its members "have standing to sue in their own right." (Order Granting MTD, Doc. 66 at 5.) Those members (including plaintiff Rasier) will plainly suffer antitrust injury because they contract with the colluding drivers for the sale and purchase of the product or service being restrained. Those members are also the immediate victims of the anticompetitive aspect of the illegal boycott, as they are coerced into denying contracts to non-conforming drivers. *See Glen Holly Entmt., Inc. v. Tektronix, Inc.*, 352 F.3d 367, 374 (9th Cir. 2003) ("One form of antitrust injury is coercive activity that prevents its victims from making free choices between market alternatives."); *see also Blue Shield of Virginia v. McCready*, 457 U.S. 465, 483–84 (1982) (customer of boycotted physician suffered antitrust injury that was "inextricably intertwined with the injury the conspirators sought to inflict" on their competitors); *Knevelbaard Dairies*, 232 F.3d

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loss means "a significant threat of injury from an impending violation of the antitrust laws." *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 130 (1969).

An antitrust violation claim requires a showing of (1) "concerted action" that (2) unreasonably "restrains trade." *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 190 (2010). As discussed above, these elements are met here because, under the ordinance, for-hire drivers act in concert to restrain trade through *per se* illegal horizontal group boycotts.

This unreasonable restraint of trade also involves concerted action by Seattle, as the Ninth Circuit has already held in this case, thereby making Seattle equally subject to injunctive relief. In the context of municipal regulation, the element of "concerted action" between the municipality and one or more private entities is satisfied if the "challenged regulation involves … a hybrid of state and private action," rather than merely "unilateral action" by a city. *Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health*, 654 F.3d 919, 926 (9th Cir. 2011); *accord Miller v. Hedlund*, 813 F.2d 1344, 1350 (9th Cir. 1987) (a "hybrid" restraint constitutes concerted action that "violate[s] the Sherman Act"). Here, the Ninth Circuit held that Seattle's collective-bargaining ordinance is such a "hybrid restraint" because the collective-bargaining agreement "turns on the discretion of private actors," with the involvement of Seattle. *Chamber of Commerce*, 890 F.3d at 789 n.16.

Indeed, concerted action involving Seattle is pervasive under the ordinance. Seattle designates a union as a qualified driver representative. *See* Decl. of Matthew Eng. ¶ 7, Doc. 39 (noting that Seattle formally designated Teamsters Local 117 as a qualified representative in 2017).

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at 988 (antitrust injury occurs "[w]hen horizontal price fixing causes buyers to pay more, or sellers to receive less, than the prices that would prevail in a market free of the unlawful trade restraint").

(The antitrust-injury requirement of the Clayton Act is inapplicable to Plaintiffs' preemption claim, which is based on the Supremacy Clause, not the private right of action contained in the Clayton Act. *Compare Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 484–89 (1977) (deriving antitrust-injury requirement from the "remedial provision" in Section 4 of the Clayton Act); *with Fisher*, 475 U.S. at 264 (addressing preemption claim without discussing antitrust injury).)

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600 University Street, Suite 3600, Seattle, WA 98101
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Seattle identifies driver coordinators for the qualified representative to contact. *See id.* (noting that the Teamsters demanded driver information from the twelve driver coordinators that Seattle had identified on its collective-bargaining webpage). Seattle requires driver coordinators to provide the union with driver contact information. Ordinance § 3(D). Seattle recognizes the union as the exclusive driver representative. *Id.* § 3(F). Seattle reviews and approves the unlawful collective-bargaining agreements. *Id.* § (H)(2). And Seattle imposes penalties on non-compliant driver coordinators. *Id.* § 3(M)(1). This extensive involvement is more than sufficient to establish Seattle's liability for the conduct at issue. *See Goldfarb*, 421 U.S. at 780–83 (governmental agency engaged in concerted action in violation of section 1 of the Sherman Act by enacting and enforcing measures that enabled private parties to fix prices).

C. Seattle's Defenses Cannot Save The Ordinance And Require No Discovery

Before Seattle amended the ordinance, it contended that it needed discovery to determine (1) "whether the nature of the market for for-hire transportation services in Seattle makes … applying a rule of *per se* invalidity inappropriate," and (2) whether collective bargaining under the ordinance "primarily involves negotiations over the price of [drivers'] labor" and is therefore exempt from the antitrust laws. (Joint Status Report, Doc. 90 at 5.) Neither question is relevant or material to the applicability of the *per se* rule to either the amended ordinance or the original ordinance.

First, the particular characteristics of the modern for-hire driver industry are irrelevant to whether the ordinance authorizes *per se* illegal price fixing or group boycotts. "In unequivocal terms," the Supreme Court has held that "the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." *Arizona*, 457 U.S. at 349. The same is true of "group boycotts," which like price fixing are *per se* illegal. *Id.* at 344 n.15. Any "argument that the *per se* rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for *per se* rules." *Id.* at 351. Application of the *per se* rule is intended to eliminate the need for discovery. Indeed, the very

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reason for the *per se* rule "is to avoid the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." *Id.* (quotation marks omitted).

Second, because the ordinance expressly applies only to drivers who are independent contractors and not employees, the ordinance does not remotely qualify for the statutory antitrust exemption for "labor organizations" established in sections 6 and 20 of the Clayton Act. 15 U.S.C. § 17; 29 U.S.C. § 52. As an initial matter, the Ninth Circuit implicitly determined that the labor exemption does not apply when it ruled that the ordinance is not immune from antitrust law, especially given that Seattle's amicus on appeal asserted the labor exemption. *See* Reply Brief for Appellants at 10 n.2, *Chamber of Commerce*, 890 F.3d 769 (No. 17-35640). Indeed, the Court instructed that "the parties may address on remand which mode of antitrust analysis applies," not whether the antitrust laws apply at all. *Chamber of Commerce*, 890 F.3d at 781.

Regardless, the exemption does not apply. A "labor organization" is an organization of employees, not independent contractors. *See* Clayton Act § 20, 29 U.S.C. § 52 (limiting prohibition on antitrust injunctions to cases involving "employers and employees"). The Supreme Court has therefore repeatedly held that "a party seeking refuge in the statutory [labor] exemption must be a bona fide labor organization, and not an independent contractor or entrepreneur." *H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 717 n.20 (1981). Further, an "employer-employee relationship" must form "the matrix" of the specific controversy at issue. *Columbia River Packers*, 315 U.S. at 144–47; *see also id.* at 147 (statutory exemption "does not … include controversies upon which the employer-employee relationship has no bearing"); *accord L.A. Meat & Provision Drivers Union v. United States*, 371 U.S. 94, 96–98 (1962) (dispute between independent grease peddlers and grease processers was not a "labor dispute"); *Women's Sportswear*, 336 U.S. at 463 (union of independent stitching contractors not "immune from attack under the antitrust laws"); *American Med. Ass'n v. United States*, 317 U.S. 519, 536 (1943)

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600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

(association of "independent physicians" was not a "labor organization" because the physicians were not employees); *Conley Motor Express, Inc. v. Russell,* 500 F.2d 124, 125–27 (3d Cir. 1974) ("appellants have failed to show that the employer-employee relationship forms the matrix of their controversy" because truck drivers "were independent contractors and not employees"); *Spence v. Southeastern Alaska Pilots' Ass'n*, 789 F. Supp. 1007, 1013 (D. Alaska 1990) (union of independent-contractor pilots was not a "bona fide labor organization").[8]

The statutory antitrust exemption is inapplicable here because Seattle's ordinance expressly applies only to independent contractors. "The provisions of this ordinance," it says, "do not apply to drivers who are employees under [the National Labor Relations Act]." Ordinance § 6. Likewise, the ordinance applies only to driver coordinators that contract with drivers "other than in the context of an employer-employee relationship." *Id.* § 3(D); *see also id.* § 1(G) (ordinance directed at "[b]usiness models wherein … drivers [are] classified as independent contractors"). In other words, there are no employees at issue under the ordinance. Because there are no employees at issue, there are no "bona fide labor organizations" involved. *H.A. Artists,* 451 U.S. at 717 n.20. All of the unionization and collective bargaining activities under the ordinance are conducted between parties who operate as independent businesses. The collective-bargaining scheme thus fails to meet the "primary prerequisite for exemption from the anti-trust laws"—"an employer-

[8] The National Labor Relations Act (NLRA) reinforces the difference between labor organizations and employees, on one hand, and independent contractors, on the other. Congress reaffirmed in the NLRA that "labor organization" means an organization "in which *employees* participate." 29 U.S.C. § 152(5) (emphasis added). And it expressly excluded independent contractors from the definition of "employee" for purposes of federal labor law. 29 U.S.C. § 152(3) ("[t]he term 'employee' … shall not include any … independent contractor"). These provisions inform the meaning of the statutory labor exemption because that exemption, like the related provisions of the Norris-LaGuardia Act, *see* 29 U.S.C. § 101, is "a precursor of the NLRA" that advances "the same policy [as] the NLRA." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1627 (2018); *see also Erlenbaugh v. United States*, 409 U.S. 239, 243–44 (1972) ("a later act can … be regarded as a legislative interpretation of (an) earlier act . . . in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting, and is therefore entitled to great weight") (quotation marks omitted).

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

employee relationship." *Conley Motor Express*, 500 F.2d at 126. By definition, then, the "labor" exemption does not apply.

And Seattle designed it this way, because it had to. If the ordinance had applied to employees, the collective-bargaining program would have been facially preempted under federal labor law. *See Int'l Assoc. of Machinists v. Wisc. Emp't Relations Comm'n*, 427 U.S. 132, 140 (1976). Only by limiting the ordinance to independent contractors could Seattle avoid labor preemption. But by choosing that path, Seattle subjected the ordinance to antitrust scrutiny. Now that Seattle has failed on its antitrust defense of state-action immunity, it apparently wishes to have things both ways: avoid the labor laws by limiting the ordinance to independent contractors; avoid the antitrust laws by invoking the labor exemption. Those two assertions are irreconcilable.

D. This Court Must Enjoin the Entire Ordinance

Based on the foregoing, Plaintiffs are entitled to permanent injunctive relief. The entire ordinance must be enjoined, moreover, because the provisions authorizing a group boycott are not severable from the rest of the ordinance.

Severability is a question of state law. *Wash. State Republican Party v. Wash. State Grange*, 676 F.3d 784, 798 (9th Cir. 2012). Under Washington law, a provision may not be severed "if its connection to the remaining [provisions] is so strong that it could not be believed that the legislature would have passed one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature." *Id.* A severability clause "is not necessarily dispositive." *McGowan v. State*, 148 Wash. 2d 278, 295 (2002). The valid and invalid provisions "may be so interrelated that, despite the presence of a severability clause, it cannot reasonably be believed that the legislative body would have passed the latter without the former." *Id.* For example, the Washington Supreme Court held that an unconstitutional funding provision was inseverable because it was the "the heart and soul of the Act," and "the Act would be virtually worthless without it." *Leonard v. City of Spokane*, 127 Wash. 2d 194, 202 (1995).

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That the boycott provision is integral to the operation of the ordinance is evident in the ordinance's text and structure. A drivers' union formed pursuant to the ordinance is denominated an "*exclusive* driver representative," and the ordinance emphasizes that it is to be "the *sole and exclusive* representative of all for-hire drivers … for a particular driver coordinator," with the terms it negotiates to be "applicable to *all* of the for-hire drivers employed by that driver coordinator." Ordinance § 2. And the entire set of provisions governing collective bargaining fall within a statutory section entitled "Exclusive driver representatives." *Id.* § 3.

Indeed, the boycott provision is a necessary component of the ordinance's design. If the voting-eligible drivers could not force the collective-bargaining agreement on every other driver, it would render the ordinance effectively null. Driver coordinators could simply contract with drivers who do not wish to be subject to the terms of the collective-bargaining agreement, and the ordinance "would be virtually worthless." *Leonard*, 127 Wash. 2d at 202. It therefore "cannot reasonably be believed that the legislative body would have passed" the ordinance without the boycott provision. *McGowan*, 148 Wash. 2d at 295. Tellingly, when the City amended the ordinance to remove the price-fixing provisions challenged in this lawsuit, it did not similarly remove the group-boycott provisions. The City Council understood that the ordinance would be virtually worthless without them.

II. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE THE ORDINANCE ORIGINALLY AUTHORIZED *PER SE* ILLEGAL PRICE FIXING

Not only is the amended ordinance preempted, but so is the price-fixing provision of the original ordinance. Seattle has attempted to evade this Court's review of its price-fixing scheme by voluntarily amending the ordinance in response to the unfavorable ruling from the Ninth Circuit. Notwithstanding the amendment, however, Seattle has consistently maintained that the price-fixing scheme is not actually a *per se* violation of federal antitrust law. In these circumstances, Plaintiffs' challenge to the price-fixing provision has *not* become moot. And there

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600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

can be no serious dispute that the price-fixing provision violates federal antitrust law. Declaratory and permanent injunctive relief against the price-fixing provision is therefore warranted.

A. The City's Voluntary Amendment Does Not Moot Plaintiffs' Challenge to the Price-Fixing Provisions

"A defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 174 (2000). Otherwise, a defendant could simply "return to his old ways" after dismissal. *Id.* at 189. To eliminate this problem, "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 190. Seattle cannot meet that high standard.

A voluntary amendment to a challenged ordinance does not make a challenge moot. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *see also Carreras v. City of Anaheim*, 768 F.2d 1039, 1047 (9th Cir. 1985) (challenge to city ordinance not rendered moot by repeal). This is true not only when the government repeals the entire ordinance, but also when the government repeals only some challenged provisions, leaving other challenged provisions in place, as Seattle has done here. In *City of Mesquite*, for example, the plaintiff challenged two "sections of a licensing ordinance governing coin-operated amusement establishments." 455 U.S. at 284–85. While an appeal was pending, the city repealed just one of the challenged provisions. *Id.* at 288. The Court rejected the city's mootness argument as to the repealed provision because "the repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated." *Id.* at 289. The Court then addressed the merits of both the existing and repealed provisions. *Id.* at 289–95.

Following *City of Mesquite*, the Ninth Circuit has routinely held that partial legislative repeal does not moot a challenge to the repealed provisions. *See Bd. of Trustees of Glazing Health*

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& Welfare Trust v. Chambers, 903 F.3d 829, 839–42 (9th Cir. 2018) (citing cases).[9] In *Chambers*, for example, the legislature repealed several challenged provisions in a statutory scheme, but left one provision in place. The Court held that the challenge to the repealed provisions was not moot, in part because the partial repeal had not "entirely resolved plaintiffs' grievance with the challenged law," and had failed to eliminate "all of [the plaintiffs'] bases for challenging it." *Id.* at 841–42 (quotation marks and alteration omitted). Similarly, in *Thalheimer v. City of San Diego*, the plaintiff challenged several provisions of a city ordinance governing campaign finance in city elections. 645 F.3d 1109, 1114–15 (9th Cir. 2011). After the district court issued an unfavorable ruling, the city amended the ordinance to repeal just one of the challenged provisions. *Id.* at 1126. On appeal, the Court held that the challenge to the repealed provision was not moot. *Id.* It therefore addressed the merits of every claim, first addressing the existing provisions, and then addressing the repealed provision. *Id.* at 1117–28.

A voluntary repeal motivated by "an adverse judicial ruling" is especially unlikely to moot a challenge to the repealed provisions. *Chambers*, 903 F.3d at 839. In that circumstance, the defendant's "heavy burden" to show mootness is generally "insurmountable." *Id.* at 839–40 (citing cases). That conclusion certainly holds when the government actor is a municipality, rather than Congress or a state legislature. *See Chem. Prod. & Dist. Ass'n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006) (distinguishing between "statutory amendment" and "local government or administrative agency repeal"). After all, it is much easier for a nine-member city council to re-enact a challenged provision than for Congress to do so through bicameralism and presentment. Thus, of the two exceptional cases *Chambers* mentions that found mootness after voluntary repeal, one involved legislative repeal by Congress, and one by a state legislature; neither involved a municipality. 903 F.3d at 841–43.

[9] The Ninth Circuit has also repeatedly explained that "whether a case is moot as a result of legislative change is a prudential rather than a jurisdictional issue." *Chambers*, 903 F.3d at 843. So the ultimate question is whether declaratory and injunctive relief is warranted, not whether this Court has subject-matter jurisdiction. *Id.* at 838–39.

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One other factor courts have considered is whether the defendant has committed not to re-enact the offending legislation. The Ninth Circuit has repeatedly rejected mootness when a defendant refuses to declare that it "will never again" engage in the challenged conduct, and refuses to demonstrate that it will not resume the conduct, such as by admitting its illegality. *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1274 (9th Cir. 1998); *Ballen v. City of Redmond*, 466 F.3d 736, 741 (9th Cir. 2006) (challenge to amended ordinance not moot because city refused to admit illegality and threatened to re-enact ordinance).

Seattle's amendment to its collective-bargaining ordinance does not moot Plaintiffs' challenge to the price-fixing provision. Seattle amended its ordinance in direct response to this litigation and to the Ninth Circuit's ruling on state-action immunity.[10] That ruling effectively foreclosed any successful defense of the price-fixing scheme. By amending the ordinance, Seattle now seeks to avoid an unfavorable judgment from this Court, while leaving the door open for the City Council to re-enact its price-fixing scheme once litigation has concluded. In these circumstances, where the City "repealed a law in response to an adverse judicial ruling," the case is "not moot." *Chambers*, 903 F.3d at 839–40.

Moreover, Seattle has not committed to this Court that it will never re-enact the price-fixing provisions. Indeed, the City has insisted throughout this litigation that it would be perfectly legal to do so. At argument before the Ninth Circuit, the City's counsel refused to concede that the ordinance authorizes *per se* illegal price fixing, insisting that contracts between for-hire drivers and driver coordinators are a "brand new arrangement" justifying special treatment under antitrust law. Oral Argument at 29:40–31:00, *Chamber of Commerce*, 890 F.3d 769 (No. 17-35640).

[10] The Ninth Circuit's mandate issued on September 24, 2018. *Chamber of Commerce v. City of Seattle*, Doc. 119, No. 17-35640. On remand, the parties initially agreed to a schedule in which Plaintiffs would file for summary judgment on December 7, 2018. *See* Stipulated Motion Regarding Motions and Briefing Schedule, Doc. 97, at 2, No. 2:17-cv-370. Just days before the due date, on December 3, Seattle notified Plaintiffs that it anticipated amending the ordinance. *Id.* Seattle enacted the amendment on January 11, 2019.

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Seattle's recent submission to this Court reaffirmed that same position: "Seattle does not agree" that the "conduct authorized by the ordinance" "involves a form of 'horizontal price fixing' subject to *per se* invalidation under federal antitrust law." (Joint Status Report, Doc. 90, at 5.) Finally, when the City Council amended the ordinance, the Council did not concede that the price-fixing provision is unlawful and gave no assurance that the price-fixing provisions would never be reinstated.[11] Significantly, the Council did not even attempt to offer a non-litigation-related reason for its abrupt reversal on the price-fixing provision, which it had quite recently believed furthered the public interest. Nor has Seattle taken steps to amend the rules implementing the original ordinance's requirement of including the nature and amount of payments as a mandatory subject of collective bargaining.[12] All of this further confirms that the City's motive for this reversal was not based on public policy, but a naked desire to avoid judgment on this question. That being so, it is quite possible that the City will reinstate the repealed provision once the litigation cloud is lifted.

In sum, not only are legislative amendments to a challenged ordinance generally insufficient to render a challenge moot, especially when the amendment is a response to an unfavorable judicial ruling, *Chambers*, 903 F.3d at 839, but Seattle has consistently insisted that there is nothing problematic about the original ordinance, both before and after the unfavorable Ninth Circuit ruling. Seattle's actions do not come close to meeting its "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190. Regardless of its ruling on the ordinance as amended, therefore, the Court should consider Plaintiffs' challenge to the recently repealed

[11] Vote on CB 119427, Seattle City Council, at 8:18 (January 7, 2019), http://www.seattlechannel.org/FullCouncil?videoid=x100796; *see also* Hearing on CB 119427, Governance, Equity, and Technology Committee, at 8:45–13:00 (Dec. 18, 2018), http://www.seattlechannel.org/mayor-and-council/city-council/2018/2019-governance-equity-and-technology-committee?videoid=x100378&Mode2=Video (same failure to concede illegality).

[12] *See* FDHR-4, available at https://bit.ly/2UWedz2.

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600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

price-fixing provisions. Absent such judicial review today, the City will be entirely free to reinstate the price-fixing provision tomorrow, and will have every political incentive to do so.

B. The Ordinance As Originally Enacted Authorized *Per Se* Illegal Price Fixing

Plaintiffs are entitled to summary judgment on their challenge to the ordinance's price-fixing provisions for the same reasons that they are entitled to summary judgment on the group-boycott provisions: as the Federal Trade Commission and Department of Justice told the Ninth Circuit in this case, the provisions authorize and facilitate a classic *per se* violation of the antitrust laws, namely horizontal price fixing. Brief for Amici United States and FTC at 8, *Chamber of Commerce*, 890 F.3d 769 (No. 17-35640).

"Foremost in the category of per se violations is horizontal price fixing among competitors"—*i.e.*, agreements among competitors to establish the price to be paid for a good or a service. *Knevelbaard Dairies*, 232 F.3d at 986. The Supreme Court has "consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense." *Arizona*, 457 U.S. at 345. "Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." *Id.* at 351 n.23 (quotation marks omitted).

As at least three Supreme Court cases demonstrate, the prohibition on price fixing applies to efforts by individual independent contractors to join or form unions to collectively bargain with companies over prices for goods or services. *L.A. Meat*, 371 U.S. at 96–98 (independent grease peddlers violated the Sherman Act by joining a union and collectively bargaining over prices for restaurant grease); *Columbia River Packers*, 315 U.S. at 144–46 (independent fishermen violated the Sherman Act by forming a union and collectively bargaining about the terms and conditions for sale of fish). *Women's Sportswear*, 336 U.S. at 463–64 (independent "stitching contractors"

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Telephone (206) 624-0900

violated the Sherman Act by forming a union and collectively bargaining over the provision of stitching services).

Thus, the FTC has consistently condemned measures similar to the ordinance because "collective bargaining over prices amounts to *per se* illegal price fixing." Letter to Wash. H. Rep. Brad Benson 5 (Feb. 8, 2002), http://bit.ly/2lsuMQP. For instance, Washington State legislation authorizing physicians to collectively bargain with health insurers would permit "precisely the sort of conduct" that is a *per se* antitrust violation: horizontal price fixing. *Id.* at 2. So would an Ohio bill allowing home health-care providers to collectively bargain over insurance reimbursements. Letter to Ohio H. Rep. Dennis Stapleton 7 (Oct. 16, 2002), http://bit.ly/2lsvRrT. And the FTC has reiterated this position in congressional testimony. *See, e.g.*, Testimony of David Wales 7 (Oct. 18, 2007), http://bit.ly/2m9Pady. Indeed, in this very case, the FTC, joined by the Antitrust Division of the Justice Department, told the Ninth Circuit that "the joint negotiation permitted by the Ordinance" is "a *per se* violation of the Sherman Act." Brief for Amici United States and FTC at 8, *Chamber of Commerce*, 890 F.3d 769 (No. 17-35640).

The FTC and DOJ are correct: the ordinance as originally enacted undeniably authorized *per se* illegal horizontal price fixing. It allowed independent contractors who are direct competitors to join together, agree with one another on the price terms of their contracts with a driver coordinator, and collectively negotiate with the driver coordinator over those price terms. Ordinance § 3(H)(1). Like the illegal grease peddlers' union in *Los Angeles Meat & Provision Drivers Union*, the illegal fishermen's union in *Columbia River Packers*, the illegal stitchers' union in *Women's Sportswear*, and the physicians' and home-health-care workers' unions condemned by the FTC, the drivers' collective bargaining over prices is *per se* illegal horizontal price fixing.

Moreover, collective bargaining under Seattle's ordinance is *per se* illegal whether the drivers are characterized as (a) sellers of driving services to a driver coordinator or (b) purchasers of ride-referral services from a driver coordinator. If the former, the Supreme Court "ha[s] specifically included the sale of services" within Section 1 of the Sherman Act. *Goldfarb*, 421

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600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

U.S. at 787. And it has repeatedly held that horizontal price fixing by sellers of services is *per se* illegal. *Id.* (legal services); *Arizona*, 457 U.S. at 335, 342–54 (health-care services); *Women's Sportswear Mfrs. Ass'n*, 336 U.S. at 463–64 (stitching services). If the latter, price fixing "by purchasers" is likewise "the sort of combination condemned by the [Sherman] Act." *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948) (footnotes omitted). The Ninth Circuit has thus made clear that "price fixing by buyers" and price fixing by sellers are equally *per se* illegal under the Sherman Act. *Knevelbaard Dairies*, 232 F.3d at 986; *see also Vogel v. Am. Soc. of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984) (Posner, J.) ("buyer cartels, the object of which is to force the prices that suppliers charge the members of the cartel below the competitive level, are illegal per se"). Whether characterized as sellers or buyers, therefore, drivers engage in *per se* illegal price fixing when they jointly negotiate the price terms of their contracts with driver coordinators.

Finally, for the reasons discussed above in connection with the ordinance's authorization and facilitation of *per se* illegal group boycotts: (i) the price-fixing provisions are preempted, (ii) Seattle's implementation of the price-fixing provisions constitutes a threatened violation of the Sherman Act, entitling Plaintiffs to injunctive relief under section 16 of the Clayton Act, and (iii) Seattle's defenses of the price-fixing provision fail as a matter of law and require no discovery. This Court should therefore declare that the price-fixing provisions of Seattle's collective-bargaining ordinance are preempted, and should permanently enjoin Seattle from enforcing them.

CONCLUSION

For the foregoing reasons, this Court should grant summary judgment in favor of Plaintiffs on Counts One and Two of the Amended Complaint and (1) declare that Seattle's collective-bargaining ordinance, both as originally enacted and as amended, is preempted, (2) declare that Seattle's implementation of the ordinance, both as originally enacted and as amended, violates Section 1 of the Sherman Act, and (3) permanently enjoin Defendants from enforcing the ordinance, both as originally enacted and as amended.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

Dated: February 15, 2019

Respectfully submitted,

By: *s/ Robert J. Maguire*

Robert J. Maguire, WSBA 29909
Douglas C. Ross, WSBA 12811
DAVIS WRIGHT TREMAINE LLP
920 Fifth Avenue, Suite 3300
Seattle, WA 98104
(206) 622-3150
(206) 757-7700 FAX
robmaguire@dwt.com

Attorneys for Plaintiff Rasier, LLC

Steven P. Lehotsky
(D.C. Bar No. 992725)
(pro hac vice)
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-3187
slehotsky@uschamber.com

Attorney for Plaintiff
Chamber of Commerce of the
United States of America

By: *s/ Timothy J. O'Connell*

Timothy J. O'Connell, WSBA 15372
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
(206) 624-0900
(206) 386-7500 FAX
Tim.oconnell@stoel.com

Michael A. Carvin
(D.C. Bar No. 366784)
(pro hac vice)
Christian G. Vergonis
(D.C. Bar No. 483293)
(pro hac vice)
Jacqueline M. Holmes
(D.C. Bar No. 450357)
(pro hac vice)
Robert Stander
(D.C. Bar No. 1028454)
(pro hac vice)
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939
(202) 616-1700 FAX
mcarvin@jonesday.com

Attorneys for Plaintiff
Chamber of Commerce of the
United States of America

CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the parties who have appeared in this case.

DATED: February 15, 2019 at Seattle, Washington.

STOEL RIVES LLP

s/ Timothy J. O'Connell

Timothy J. O'Connell,
WSBA No. 15372
600 University Street, Suite 3600
Seattle, WA 98101
Telephone: (206) 624-0900
Facsimile: (206) 386-7500
Email: tim.oconnell@stoel.com